6-5-2014

State v. Burnet Respondent's Brief 2 Dckt. 40840

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 40840
Plaintiff-Respondent,	)	
	)	Kootenai Co. Case No.
vs.	)	CR-2009-2942
	)	
JAY MORRIS BURNET,	)	
	)	
Defendant-Appellant.	)	
	)	

REVISED BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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STATEMENT OF THE CASE

Nature Of The Case

Jay Morris Burnet appeals from the trial court's modification of his sentence following the revocation of Burnet's probation. Specifically, Burnet contends the district court abused its discretion by revoking his probation and by failing to *sua sponte* reduce his sentence further. Burnet also claims the Idaho Supreme Court violated his constitutional rights by denying his motion to augment the appellate record with as-yet-unprepared transcripts of his 2009 change of plea and sentencing hearings as well as the 2011 review hearing following his completed period of retained jurisdiction.

Statement Of Facts And Course Of Proceedings

As part of a global resolution of multiple charges against him, Burnet pled guilty in 2009 to eluding a police officer. The court sentenced Burnet to a unified five year sentence with all five years fixed, to be served consecutively to his other sentences. (R., p.87.) In 2011, Burnet pled guilty to a new charge and entered admissions to probation violations. (R., pp.143-145.) The court sentenced Burnet, including a modification of his previous eluding charge from a "fixed" sentence of "FIVE (5) years followed by an indeterminate term of ZERO (0) years)" to a "fixed sentence of FOUR (4) years fixed and an indeterminate sentence of ONE (1) year INDETERMINATE." (R., p.146 (emphasis original).) As in his original judgment, the eluding sentence was consecutive to the previously entered sentences. (Id.)

An amended judgment and sentence and notice of right to appeal was entered by the trial court in response to a post-conviction action alleging ineffective assistance of counsel for failure to file an appeal. (R., pp.152-157.) That amended judgment contained the same language as the original regarding the modification of Burnet's sentence for eluding a police officer. (R., p.155.) Burnet timely appealed from the amended judgment. (R., pp.158-159.)

Burnet filed a motion to augment, seeking to have prepared and included in the appellate record transcripts of his 2009 change of plea and sentencing hearings, as well as of his February 2010 retained jurisdiction review hearing. (Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof, filed July 11, 2013.) The state objected to all of the requested transcripts. (Objection to "Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof," filed July 16, 2013.) The Idaho Supreme Court denied Burnet's motion without prejudice, allowing Burnet to "demonstrate that the transcripts requested [were] necessary and relevant with regard to the specific issues on appeal." (Order, dated July 29, 2013.) Burnet thereafter filed a renewed motion to augment. (Renewed Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof, filed September 9, 2013.) The state filed an objection to the renewed motion to augment. (Objection to "Renewed Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof," filed Septmeber 17, 2013.) The Idaho Supreme Court denied Burnet's renewed motion in its entirety. (Order, dated October 15, 2013.)

ISSUES

Burnet states the issues on appeal as:

1. Whether the Idaho Supreme Court denied Mr. Burnet due process and equal protection when it denied his motion to augment the record with transcripts necessary for review of the issues on appeal.

2. Whether the district court abused its discretion when it revoked Mr. Burnet's probation, or alternatively, by not further reducing his sentence when it did so.

(Appellant's second revised brief, p.7.)

The state rephrases the issues on appeal as:

1. Assuming this Court addresses the issue, has Burnet failed to show any constitutional violation resulting from the Idaho Supreme Court's denial of his motion to augment the record with a transcript that has not been prepared?

2. Has Burnet failed to show the district court abused its discretion in revoking probation or failing to further reduce his sentence?

ARGUMENT

I.
If This Case Is Assigned To The Idaho Court Of Appeals, That Court Lacks The Authority To Review The Idaho Supreme Court's Decision To Deny Burnet's Motion To Augment The Record; Alternatively, Burnet Has Failed To Show Any Constitutional Violation Resulting From The Denial Of His Motion To Augment

A. Introduction

Burnet argues that, by denying his motion to augment the appellate record with as-yet-unprepared transcripts of his 2009 change of plea and sentencing hearings and the 2010 review hearing of Burnet's period of retained jurisdiction, the Idaho Supreme Court violated his constitutional rights to due process and equal protection and has denied him effective assistance of counsel on appeal. (Appellant's Brief, pp.8-13.) Should this case be assigned to the Idaho Court of Appeals, that Court lacks the authority to review the Idaho Supreme Court's decision to deny Burnet's motion. Even if this Court reviews the denial of Burnet's Motion, Burnet has failed to establish any violation of his constitutional rights.

B. Standard Of Review

The standard of appellate review applicable to constitutional issues is one of deference to factual findings, unless they are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

C. The Idaho Court Of Appeals, Should It Be Assigned This Case, Lacks The Authority To Review The Idaho Supreme Court's Decision

The Idaho Court of Appeals has "disclaim[ed] any authority to review, and, in effect, reverse an Idaho Supreme Court decision made on a motion made prior to assignment of the case to [the Idaho Court of Appeals] on the ground that the Supreme Court decision was contrary to the state or federal constitutions or other law." State v. Morgan, 153 Idaho 618, 620, 288 P.3d 835 (Ct. App. 2012). "Such an undertaking," the Court explained, "would be tantamount to the Court of Appeals entertaining an 'appeal' from an Idaho Supreme Court decision and is plainly beyond the purview of this Court." Id. However, the Idaho Court of Appeals did leave open the possibility of review of such motions in some circumstances. Id. Such circumstances may occur, the Court indicated, where "the completed appellant's and/or respondent's briefs have refined, clarified, or expanded issues on appeal in such a way as to demonstrate the need for additional records or transcripts, or where new evidence is presented to support a renewed motion." Id.

Should the Idaho Court of Appeals be assigned this case, it lacks the authority to review the Idaho Supreme Court's order. Burnet has failed to demonstrate the need for additional transcripts. The arguments Burnet advances on appeal as to why the record should be augmented with the transcript at issue constitute essentially the same arguments he presented to the Idaho Supreme Court in his Renewed Motion – *i.e.*, that the scope of appellate review of a sentence requires consideration of such and that his constitutional rights will be

violated without the transcripts. (Compare Renewed Motion to Augment with Appellant's second revised brief, pp.8-13.)

Because the Idaho Court of Appeals lacks the authority to review, and in effect, reverse a decision of the Idaho Supreme Court, and because Burnet has failed to provide any new evidence or clarification in his Appellant's brief that would permit the Idaho Court of Appeals to do so, the Idaho Court of Appeals must decline, if it is assigned this case, to review the Idaho Supreme Court's denial of Burnet's motion to augment the record.

D. Even If This Court Reviews The Merits Of Burnets Arguments, Burnet Has Failed To Show The Idaho Supreme Court Violated His Constitutional Rights

To the extent this Court considers the merits of Burnet's constitutional claims, all of his arguments fail. Burnet argues that he is entitled to transcripts of his 2009 change of plea and sentencing hearing and 2010 review hearing because, he claims, the failure to provide it is a violation of his constitutional rights to due process, equal protection, and the effective assistance of appellate counsel. (Appellant's Brief, pp.8-13.) The Idaho Supreme Court recently considered and rejected the same arguments in State v. Brunet, 155 Idaho 724, 316 P.3d 640 (2013) (reh'g denied).

In Brunet, the Court stated: "When an indigent defendant requests that transcripts be created and incorporated into a record on appeal, the grounds of the appeal must make out a colorable need for the additional transcripts." Brunet at ___, 316 P.3d at 643 (citing Mayer v. City of Chicago, 404 U.S. 189, 195 (1971)). "[C]olorable need is a matter of law determined by the court based upon

the facts exhibited." Id. In order to show a colorable need, an appellant must show "the requested transcripts contained specific information relevant to [the] appeal." Id. "[H]ypothesiz[ing] that the lack of . . . transcripts could prevent [the appellant] from determining whether there were additional issues to raise, or whether there was factual information contained in the transcripts that might relate to his arguments" does not demonstrate a "colorable need." In other words, an appellant is not entitled to transcripts in order to "search the transcripts for a reason to request and incorporate the transcripts in the first place." Id. Such an endeavor is a "'fishing expedition' at taxpayer expense" – an exercise the constitution does not endorse. In short, "[m]ere speculation or hope that something exists does not amount to the appearance or semblance of specific information necessary to establish a colorable need." Id.

Burnet argues transcripts of his 2009 change of plea and sentencing hearings as well as his 2010 review hearing following a period of retained jurisdiction are relevant, regardless of whether they have been prepared or not, because the minutes of those hearings indicate Burnet made statements "that were mitigating in nature" and "statements in allocution." (Appellant's second revised brief, p.11.) Additionally, Burnet argues a witness testified at his change of plea and review hearing about alternative rehabilitative opportunities. (Appellant's second revised brief, p.12.) Burnet argues that because "the same district court judge who revoked [his] probation also presided over all three of the hearing at issue, the statements made during those hearings are part of the record that was availabe to the district court when it relinguished jurisdiction," and

as such "there is a colorable need for those transcripts and the information therein." (Appellant's second revised brief, p.13 (parenthetical citation omitted).)

Neither Burnet's reliance on the fact that the same judge presided over all the hearings in this case nor the standard for reviewing a sentence show a colorable need for additional transcripts. Burnet has cited no basis for concluding that any comments made at his 2009 change of plea and sentencing hearings nor his 2010 retained jurisdiction review hearing had any bearing on or relevance to the district court's decision to revoke probation in 2011. Presumably if Burnet had something compelling to say that could impact the court's decision whether to revoke probation, he said it (or, at the very least, could have said it) at the disposition hearing in 2011 rather than assuming that the court would remember it. Even if Burnet believes the district court, in 2011, remembered and relied on some specific prior statements from the 2009 change of plea and sentencing hearings and the 2010 review hearing that would be pertinent to this Court's review of the relinquishment decision, Burnet could have obtained that information by means other than having a transcript prepared, *e.g.,* he could have requested and listened to the recording of that hearing and, had he discovered something relevant, he could have moved to augment making the appropriate showing of relevance. He did not.

The record in this case contains the relevant sentencing materials including the original 2009 presentence report with updates, the 2010 addendum to the presentence report, 2010 letters of reference in Burnet's support, the 2011 motion for probation violation and report of probation violation, and a verbatim

transcript of the September 1, 2011 probation violation disposition hearing. There is no indication from the transcript of the jurisdictional review hearing that the court considered any other information in deciding to relinquish jurisdiction. (See generally Tr.) "Therefore, the entire record available to the trial court at sentencing is contained within the record on appeal." Brunet at ___, 316 P.3d at 644. As such, Burnet "has failed to demonstrate that he was denied due process or equal protection by this Court's refusal to order the creation of transcripts at taxpayer expense in order to augment the record on appeal." Id.

Burnet next argues that he is deprived of the effective assistance of appellate counsel without the requested transcript. (Appellant's second revised brief, pp.13-14 n.8.) This argument also fails. Addressing the claim that "refusal to order the creation of the requested transcripts for incorporation into the record" results in the "prospective[ ]" denial of the effective assistance of counsel, the Court in Brunet concluded Brunet "failed to demonstrate how his counsel's performance fell below an objective standard of reasonableness without the requested transcripts," noting "the entire record available to the trial court at sentencing is contained within the record on appeal." Brunet at ___, 316 P.3d at 644. The same is true in this case. "This record meets [Burnet's] right to a record sufficient to afford adequate and effective appellate review." Id. Further, Burnet's ineffective assistance of appellate counsel claim is premised on the unfounded assertion that the transcipts he sought to augment are relevant. (Appellant's Brief, pp.13-14 n.8.) Since Burnet has failed to show the record on

appeal is inadequate, he has also failed to show a Sixth Amendment violation based on the denial of his motion to augment.

Because Burnet has failed to show a "colorable need" for the transcripts he was denied, assuming this Court addresses his argument that the denial of his motion to augment the appellate record with those transcripts violated his constitutional rights, his argument fails.

II.
Burnet Has Failed To Show The District Court Abused Its Discretion In Revoking Probation Or Failing To Further Reduce His Sentence

A. Introduction

Burnet contends the district court abused its discretion by revoking probation and failing to further reduce his sentence upon revocation of his probation. (Appellant's second revised brief, pp.14-20.) Review of the record and the applicable legal standards shows both of Burnet's arguments fail.

B. Standard Of Review

"Sentencing decisions are reviewed for an abuse of discretion." State v. Moore, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994)).

C. The District Court Did Not Abuse Its Discretion By Revoking Burnet's Probation

The decision to revoke probation lies within the sound discretion of the district court. State v. Roy, 113 Idaho 388, 392, 744 P.2d, 116, 120 (Ct. App. 1987); State v. Drennen, 122 Idaho 1019, 842 P.2d 698 (Ct. App. 1992). When

deciding whether to revoke probation, the district court must consider "whether the probation [was] achieving the goal of rehabilitation and [was] consistent with the protection of society." Drennen, 122 Idaho at 1022, 842 P.2d at 701.

Burnet argues that "several of [the] factors" appropriately considered "in regard to the decision to revoke probation" were present but "were insufficiently considered by the district court as it crafted its disposition in regard to Mr. Burnet." (Appellant's second revised brief, p.15.) Burnet claims that although he has been diagnosed with "major depression, recurrent," his history "indicates that [he] is able to conform to the requirements of probation and be a productive member of society." (Appellant's second revised brief, p.16.) Burnet further asserts the reaon for his first probation "was the combination of losing his job and his father's hospitalization." (Appellant's second revised brief, p.17.) This, Burnet argues, helps demonstrate "family constitutes an important part of" Burnet's "support network, which can help in rehabilitation." (Appellant's revised brief, p.17.) Burnet's arguments do not show an abuse of discretion in the district court's decision to revoke probation.

Burnet has an extensive criminal history, including being on probation for two prior felonies when he pled guilty to a felony eluding, which included a driving under the influence charge, in the instant case. Prior to sentencing for the eluding, Burnet's probation officer believed Burnet was not a candidate for probation:

> PO Black advised that Mr. Burnet is desperately in need of extensive, long term treatment and programming within a structured environment. She believes that sending him to prison into a

> Therapeutic Community Program is necessary to keep him from killing himself or someone else.

(PSI, p.10.) Instead, the court retained jurisdiction in Burnet's cases and ultimately placed him back on probation after completioin of the retained jurisdiction program. (R., pp.86-90, pp.100-106.) Burnett admitted his most recent probation violation allegation in total and pled guilty to a new felony charge of driving under the influence. (R., pp.125-127; Tr., p.17, L.8 – p.19, L.3.)

Burnet argues on appeal that the distirct court "did not sufficiently consider whether Burnet's probation was adequately serving the goal of rehabilitation or whether society required protection from [him] through incarceration." (Appellant's second revised brief, pp.15-16.) This argument is contradicted by the record. The court had the benefit of Burnet's mental health history as well as his lengthy criminal history (see generally, PSI) and concluded the "only outcome that [made] sense given the public safety problem" was incarceration (Tr., p.24, Ls.24-25). In reaching this conclusion, the court recognized a pattern of continued criminal behavior in spite of repeated opportunities for rehabilitation: "[y]ou've committed a crime that really brings the safety of the public into jeopardy, and this isn't the first time that you've huffed and driven[.]" (Tr., p.24, Ls.12-14.)

Having considered the information before it, and the goals of sentencing, the district court correctly concluded its only option was to revoke Burnet's probation. Burnet has failed to show this was an abuse of discretion given the past opportunities made available to him and his repeated failure on probation.

D. The District Court Did Not Abuse Its Discretion By Failing To Further Reduce Burnet's Sentence Upon Revoking Probation

Upon revoking a defendant's probation, a court may order the original sentence executed or reduce the sentence as authorized by Idaho Criminal Rule 35. State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 7 (Ct. App. 2009) (citing State v. Beckett, 122 Idaho 324, 326, 834 P.2d 326, 328 (Ct. App. 1992); State v. Marks, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989)). A court's decision not to reduce a sentence is reviewed for an abuse of discretion subject to the well-established standards governing whether a sentence is excessive. Hanington, 148 Idaho at 28, 218 P.3d at 7. Those standards require an appellant to "establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment." State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). Those objectives are: "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrong doing." State v. Wolfe, 99 Idaho 382, 384, 582, P.2d 728, 730 (1978). The reviewing court "will examine the entire record encompassing events before and after the original judgment," *i.e.*, "facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation." Hanington, 148 Idaho at 29, 218 P.3d at 8.

In imposing sentence, the court modified Burnet's fixed period of his sentence for eluding from five years to four years with one year indeterminate to help ensure Burnet received yet another attempt at the Therapeutic Community. (R., p.146; see generally Tr., p.25, Ls.17-24, p.27, Ls.1-9.) Burnet asserts on

appeal the court abused its discretion by "not further reducing Mr. Burnet's sentence further" as it had "the authority to reduce the sentence, *sua sponte*, pursuant to Rule 35." (Appellant's second revised brief, p.18 (case citation omitted).) A recent Idaho Court of Appeals' decision published subsequent to the filing of Burnet's second revised brief renders this argument moot. In State v. Clontz, ___ ID ___, ___P.3d ___, 2104 WL 2119164 *4 (Idaho App. May 22, 2014), the court held Clontz's claim that the "district court erred by failing to sua sponte reduce his sentence pursuant to its discretionary authority under Rule 35" was not a violation of a constitutional right and therefore "not reviewable as it [did] not constitute fundamental error." In light of the Clontz decision, Burnet's claim that the district court erred by failing to *sua sponte* reduce his sentence further is not reviewable.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order revoking Burnet's probation.

DATED this 5th day of June, 2014.

NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of June, 2014, served a true and correct copy of the attached REVISED RESPONDENT'S BRIEF by causing a copy addressed to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

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NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm